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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO.

FLORENCE PRINTING COMPANY,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

and

CHARLESTON TYPOGRAPHICAL UNION NO. 43,
Intervenor

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court of Appeals has rendered in the above-entitled case. And the petitioner respectfully shows to this Court:

THE OPINION AND ORDER OF THE COURT AND ADMINISTRATIVE AGENCY BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is printed in the appendix to this Petition but has not yet appeared in the Federal Reporter.

This case came to that Court on appeal from a decision and order of the National Labor Relations Board. The said decision and order of the Board is reported as 158 NLRB No. 1, and is printed in the record which has been filed with this Court.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fourth Circuit, which the petitioner now asks this Court to review, is dated March 21, 1967, and was entered by the Court on that date.

Jurisdiction to review the decision of the Court of Appeals, through the procedure of certiorari, is conferred upon this Court by the provisions of 28 U.S.C. §1254.

QUESTIONS PRESENTED FOR REVIEW

1. Is the National Labor Relations Board authorized to require that an employer shall pay full and unmitigated back wages to its striker-employees regardless of undisputed evidence which shows that such employees have not sought interim employment in mitigation of damages?

2. In order to make a *prima facie* showing that reinstated employees have not fulfilled their lawful obligation to mitigate their damages, is an employer bound to prove by direct evidence that each employee personally received, and unjustifiably rejected, an offer of an interim job equivalent to the one which he had held with the employer?

3. Where it is conceded that employees did not accept interim employment on account of their continuing obligation to engage in strike activities in behalf of their union, does the National Labor Relations Board have the authority to require that their employer shall pay them full back wages as though they have discharged their duty to seek interim employment in mitigation of damages?

STATUTE INVOLVED IN THE CASE

The following section of the National Labor Relations Act is involved here:

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter. . . ." (provisos omitted from this section).

National Labor Relations Act,
29 U.S.C. §160(c)

STATEMENT OF THE CASE

On September 5, 1962, thirteen of the petitioner's employees struck for recognition by the petitioner[1] of Charleston Typographical Union No. 43[2] as their bargaining agent without an election as is provided for in the National Labor Relations Act (3).[3] On November 21, 1963, the National Labor Relations Board ruled this to have been an unfair

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[1]Hereinafter sometimes referred to as the "Company."

[2]Hereinafter referred to as the "Union."

[3]Unless otherwise indicated, all page references are to the printed joint appendix filed in the Court of Appeals and now included in the record filed with this Court.

labor practice strike and ordered reinstatement of strikers with back wages payable by the petitioner from such time as the Union offered to return them to work until they were reinstated by the Company. *Florence Printing Company*, 145 NLRB 141 (1963). Following that, on July 7, 1963, the Union offered to return the strikers to their jobs (3).

On petition of the Board, the Court of Appeals for the Fourth Circuit issued its decree granting enforcement of the Board's order. *National Labor Relations Board v. Florence Printing Company*, 333 F. 2d 289 (4 Cir. 1964). The effective date of the Court's decree was June 10, 1964. The petitioner promptly complied with all phases of the Board's order and the Court's decree, except for settlement of the amount of back wages due to striking employees.[1] The period of liability of the petitioner for back wages was from July 7, 1963 until June 30, 1964 when they were offered reinstatement (3-4). When it developed that, for this entire period, eight of the strikers contended that they had no interim earnings whatever and claimed no expenses incurred in seeking interim employment (4-8), and that the remaining five had reported only trivial earnings,[2] the parties were unable to agree on the amount of back wages due the strikers. A backpay specification was issued and a hearing was ordered to be held for the purpose of resolving these issues (61-81).

The Board's compliance division and its General Counsel insisted that the petitioner was legally bound to pay strikers

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[1]One of the strikers, Romelous E. Bass, was not reinstated because he severely assaulted a company supervisor during the strike. The Board sustained the Company's contention that Bass should be disqualified on account of such assault (141-143).

[2]Ranging from $39.00 in the case of Hanna (5) to $572.00 in the case of Schuyler (6-7).

full back wages as if it made no difference whether they sought interim employment in mitigation of damages, and as if it was immaterial that they had in fact rejected interim job offers unless the petitioner was able to prove that they had done so. More specifically, it was their position that, whatever the true facts may be, the petitioner was responsible for paying full back wages unless it could show by direct evidence as to each striker that he or she had received a personal offer of a job equivalent to that held with the petitioner and had rejected such offer without any justification for having done so.[1] These Board agencies steadfastly held to that position even in instances where their own investigation revealed direct proof that strikers had in fact rejected such personal offers of employment in equivalent jobs.

Of course these theories were not stated in so many words, but the fact that the Board was relying upon them was manifested again and again throughout the proceeding. And, as the record shows, the Board unreservedly shared the Union's openly-announced view that the Union had every right, in connection with its payment of large benefits to strikers, to require that strikers engage in no interim employment which would materially interfere with their continuing strike duties and that, by acquiescence in such requirement, the striker should suffer no reduction in their back wage claims.

In his deliberations, the trial examiner for the Board ignored the direct and circumstantial evidence which clearly showed that strikers had not sought interim employment. He also disregarded evidence that three of the strikers had per-

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[1]Except for such actual earnings as admittedly were received by the five employees referred to above.

sonally been offered suitable interim jobs, but had unjustifiably rejected such offers.

Except for his disqualification of Bass, the trial examiner confined his consideration of back wage issues to a technical analysis of the nature of strike benefits and the establishment of a burden of proof consistent with the position which General Counsel had taken.[1] He held that strike benefits were in the nature of "insurance" and therefore not "earnings," without ever considering the question of whether the employees were induced by such strike benefits to refrain from seeking interim employment (99-108). As to the burden of proof, he held that because the petitioner had not proven that each *"given"* employee had been personally offered equivalent work by other employers during the liability period, the petitioner had ". . . failed to meet the burden of proof required of it. . . ." (137-139).

On appeal, the full Board fully sustained the trial examiner's ruling with respect to backpay issues (141-144).

The Court of Appeals gained jurisdiction over the proceeding by virtue of a petition for review which was filed by the Company pursuant to the provisions of Section 10(f) of the National Labor Relations Act, 29 U.S.C. §160(f). The court panel which considered the case divided over the issues. The majority of the panel approved the Board's rulings and refused to grant the petitioner any relief from the Board's order. Judge Boreman dissented on the ground that the petitioner had made a *prima facie* showing of lack of due diligence on the part of the strikers to minimize their losses (Appendix,[2] pp. 15a-21a).

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[1]In addition, the examiner did excuse Glenn A. Johnson for rejecting a job offer at Rock Hill, South Carolina. As will be seen, this was not material to the real issues in the case (135-136).

[2]The appendix to this Petition.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. There is a rapidly growing conflict among the courts of appeal upon the question involved here of whether reinstated employees are entitled to full back wages without ever being called as witnesses to rebut circumstantial proof, and necessary inferences, that they have not diligently sought to mitigate their losses.

2. If this important question is not settled by this Court, such conflict will proliferate into the future, both uncertainty and further conflicts among the Federal courts.

ARGUMENT AMPLIFYING WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

In supplemental proceedings such as this, the purpose of which is to establish the amount of back wages due employees under a Board order, it is obvious, of course, that the employees and the Board's investigating division have a virtual monopoly over the direct evidence relating to the issue of whether the employees have diligently sought interim employment in an effort to mitigate losses. The question therefore arises as to the propriety of the Board's aligning itself with such employees as a partisan advocate of their cause and, with full knowledge that they have not sought to mitigate their losses, utilizing Board processes to collect full backpay for them, with the result that the employees are made more than whole. Should not the Board be required to see that all of the relevant evidence is brought out into the open in an effort to assure that the parties' rights and obligations shall be established upon the basis of the true facts, or should the Board be free to impose upon the employer a "burden of proof" which has the effect of concealing such true facts and rewarding strikers for will-

fully incurring wage losses? It seems to the petitioner that this Court has fully answered these questions.

> "[The Board] 'acts in a public capacity to give effect to the declared public policy of the Act . . .' "
>
> *Phelps Dodge Corporation v. National Labor Relations Board,* 313 U.S. 177, 193, 61 S. Ct. 845, 852, 85 L. ed. 1271, 1282 (1941)

The petitioner submits that an appraisal of the Board's handling of this case will lead inevitably to the conclusion that the result here has been brought about by the Board's improper assumption of the role of a private advocate.

The case involves employees whose talents and wages vary widely, ranging from apprentices or trainees earning the minimum wage of $1.25 per hour to journeymen printers earning $2.40 per hour (61-69, 137). At the hearing before the Board, the petitioner established that there was a heavy demand for labor in the local area throughout the liability period. Numerous jobs at various kinds of work were advertised daily in petitioner's newspaper, which was in general circulation in the area (19-21). These jobs offered starting wages which ranged higher than the wages which had been received by many of the strikers for their work at petitioner's place of business.

Jobs for journeymen printers also were available at The Herald Publishing Company in nearby Dillon, South Carolina at wages equal to those which the petitioner had paid its striking journeymen printers (29-32, 53-54, 151-153). Four such journeymen worked part time at that company and, therefore, were well aware of the availability of jobs on a full-time basis. But they carefully restricted their work

to no more than one shift per week—a restriction calculated to avoid forfeiture of their strike pay.[1] In connection with his limited disqualification of Bass for backpay, the trial examiner found that this work was suitable for journeymen printers and that the distance of twenty-eight miles to Dillon was no excuse for refusing to accept it (128-134). Yet, none of these four ever asked for full-time work in these jobs (35).

There were other printing establishments in the area but there was no evidence that any of the strikers ever applied for work there (40, 50). Johnson admitted under oath that he had not done so[2] (40). He also admitted that he had not sought any other work, and insofar as he knew as spokesman for all the strikers, that none of them had either (40-41).

Moreover, when registering with the Employment Security Commission, a necessary prerequisite to eligibility for unemployment pay, the strikers specifically restricted their pretended availability for work to jobs of the same type they had held with the petitioner (41). And, at the same time, they were taking the position that no such similar work was available (59-60). This necessarily meant, of course, that they were not seeking employment.

In addition to all of the foregoing, there was evidence that Bass, Glenn A. Johnson, Windham and Schuyler were personally and individually solicited to accept full-time work by The Herald Publishing Company and that they rejected such job offers. In his pre-hearing affidavit, Bass admitted

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[1]This phase of the case will be more fully discussed later.

[2]This was in an Employment Security Commission hearing where Johnson was speaking for all of the strikers in an effort to qualify them for unemployment pay (38-41).

that "In Oct. 1963 the Herald offered me a full time job ...." and that "I was not the only one of the strikers offered jobs.... The Dillon Herald offered Glenn [Johnson], Norris Windham, Eddie Schuyler and myself jobs that I know of" (152-153). This affidavit was credited by the trial examiner and accepted as "evidence of record" (131-132).

Apart from that, and Bass' repeated adoption and ratification of his affidavit from the witness stand (43-47), Bass admitted in his testimony at the hearing that such offers were in fact made to all four of these named strikers (46). He sought to offset this testimony and his affidavit with his patently absurd, and self-contradicting, claim that these offers were made, or were to be effective, after the strike was over (46). The trial examiner discredited this contradiction and partially disqualified Bass, but never mentioned that Johnson, Schuyler and Windham were included in the evidence which disqualified Bass (129-132). As to this same incident, Johnson's testimony was as follows:

"Q. During the time that you were working there at The Herald Publishing Company, was Mr. Jackson there that entire time? A. Yes, he had been there the whole time, yes.

* * *

"Q. . . . During the period that you were working down there, did you ever have any conversations with Mr. Jackson on the subject of a full time job for yourself at The Herald Publishing Company? A. No sir. *The only thing ever mentioned about a full time job is that during the conversations from day to day we were talking and he brought up one time about the four operators that we had going over there.*

"Q. Now, who were these four? A. Myself, R. E. Bass, Eddie Schuyler and Norris Windham" (54) (emphasis supplied).

This evidence poses the most obvious and glaring question of why, in this one-year period, eight of these strikers earned nothing, and the other five so little, while none of them claimed any expense incurred in seeking employment.[1] The answer to this is equally as obvious and glaring. The Union induced—indeed it ordered—strikers not to accept interim work. Not only that, the Union, with Board approval, freely and openly asserts that it had a right to, and did, require that strikers should continue to serve the Union's strike cause, thereby eliminating any possibility of their mitigation of damages and, at the same time, asserted that the Board could require the petitioner to pay them while they were striking for the Union.

Union payments to employees, in effect during the strike, were continued throughout the liability period. In five of the thirteen cases, such strike pay exceeded the full amount of wages that the strikers would have earned had they been working for the petitioner. Such pay for the remaining eight ranged up from 72% to 100% of such wages (100-103). The right of employees to receive these payments was subject to several conditions. They were required to report to the picket line daily (105), and they were also required to walk the picket line each day unless they were excused from doing so (55, 60, 152). If any striker had worked at interim employment for more than one regular shift in any work-

[1]The only expenses claimed were those incurred by the four who engaged in part-time work at the Herald Publishing Company and this was only for expenses incurred traveling to and from those jobs (81).

week, he would have been penalized to the extent of 25% of his strike pay for each such additional shift (105). The few strikers who did supplement their strike pay by part-time work at The Herald Publishing Company never worked over this limitation and, therefore, incurred no forfeiture in strike pay.[1] Each of them averaged well under ten shifts during each of the three-month quarters in which they engaged in this part-time work and their work throughout the part of the year 1964 was negligible[2] (80).

The General Counsel called Glenn A. Johnson as a witness but made no attempt to explain why he failed to seek or refused to accept any of the available work referred to above[3] (48-54). The Union supplied the answer by eliciting the following testimony from Johnson:

> "Q. (By [union representative] Mr. McFee) Mr. Johnson, *could you have taken a Job?* A. *No sir.* (emphasis supplied)
>
> Q. What was your position with the union? A. My position with the union?
>
> Q. Yes sir. A. Chapel Chairman, are you talking about during the strike?

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[1]The maximum strike pay was $74.40 per week (20). In the 51-week liability period, the maximum amount payable would be $3,814.80. The payments to Johnson, Schuyler and Windham established by stipulation in each case exceeded that figure (102-103).

[2]The part-time earnings reported in Appendix E-1 on page 80 were at the rate of $2.30-$2.40 per hour (30).

[3]Apart from efforts to secure a denial that Johnson had been personally solicited by the Herald Publishing Company (54), General Counsel confined his questions to justifying Johnson's refusal of a job offer at Rock Hill, South Carolina — a factor which will be more fully discussed later (48-54).

Q. During the strike? A. Well, there was two designations, I am Chapel Chairman and during the strike, I was also strike committee chairman" (54-55).

Moreover, when Bass received the offer of a full-time job at the Herald Publishing Company, he responded "that he would talk with the union officials in Charleston . . . [to see] if they would release him." He later reported, ". . . that they would not release him and he could not take the job" (30). When union representative McFee was asked, by a Company representative, why he had refused to let Bass accept this offer, he merely retorted that Bass "was an employee of [the petitioner] whether [the petitioner] liked it or not" (26). Bass' case is no longer in issue, but this surely does not mean that this evidence is irrelevant here—it proves that the Union was directing strikers not to engage in interim employment, and that the strikers were acquiescing in such orders of the Union.

In his affidavit to the Board, Bass specifically stated that he, Johnson, Schuyler and Windham had not accepted the jobs offered in Dillon because "We felt the offers were being made to get us off the picket line" (152). Similarly, as to Johnson, the Union elicited testimony that he received a job offer from a publisher in Rock Hill, when allegedly such job offers usually come through mere foremen (55-56). The purpose of this peculiar testimony was incorporated in the trial examiner's approving notation that "This made Johnson and the Union official suspicious that the offer was induced by Respondent *in order to remove Johnson from his leadership of the strike and to get him out of town*" (136) (emphasis supplied).

In light of revelations in the testimony of Bass and Johnson that they and others had willfully incurred wage losses

it is not surprising that no further employee witnesses were called by the Board's General Counsel or the Union.

The duty of employees with respect to damage mitigation in such cases was settled by this Court in 1941, and has been reiterated and explained in numerous cases since that time.

"Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."

Phelps Dodge Corporation v. National Labor Relations Board, 313 U.S. 177, 197-198, 61 S. Ct. 845, 854, 85 L. ed. 1271, 1285 (1941)

". . . [T]he purpose of a back pay award is to make whole the employee. . . . *Of course, an employee must use reasonable diligence to find employment during the period of discrimination. He is not entitled to back pay for periods during which he voluntarily remained in idleness."* (emphasis supplied)

National Labor Relations Board v. Brown & Root, Inc., 311 F. 2d 447, 452 (8 Cir. 1963)

"We shall . . . set aside the Board's order and remand the case to the Board with direction that it make specific findings of fact with respect to the matter and award to Bramer no more than the difference between what he could have earned by working for respondent . . . and *what he could have earned elsewhere if he had used due diligence to secure other employment."* (emphasis supplied)

National Labor Relations Board v. Pugh & Barr, Inc., 207 F. 2d 409, 410 (4 Cir. 1953)

". . . [T]he usual wage earner, reasonably conscious of the obligation to support himself and family by suitable employment, after inability over a reasonable period of time to obtain the kind of employment to which he is accustomed, would consider other available, suitable employment at a somewhat lower rate of pay 'desirable new employment.'"

National Labor Relations Board v. Southern Silk Mills, 242 F. 2d 697, 700 (6 Cir. 1957)

"We cannot accept the Board's conclusion that Fulcher was not obligated to seek and accept agricultural employment. The record discloses that such employment was available. The Board seems to think that Fulcher was bound to accept no work save preaching and work in saw mills. To us that seems quite unreasonable.

. . .

"As to Fulcher, the Board's order is set aside with the direction that the Board deduct from the amount awarded him such an amount as Fulcher could have earned had he used due diligence to seek other suitable employment, including agricultural employment."

National Labor Relations Board v. Moss Planing Mill Co., 224 F. 2d 702, 705, 706 (4 Cir. 1955)

". . . [T]here *were, in the area where* [*the employee*] *resided, at least 18 business establishments, in addition to a highway construction project.* In view of these circumstances . . . we adopt the Trial Examiner's finding as to the inadequacy of Wagner's search for work." (emphasis supplied)

Missouri Transit Company, Inc., 125 NLRB 1316, 1318 (1959)

". . . [T]he fact that Alvarez registered for work with the Texas Employment Commission is no more than a

factor to be given such weight as it may be entitled under all the circumstances of the case and is to be considered as such, along with the circumstance that he applied for work at the union hiring hall, in determining whether Alvarez made a reasonable search for employment.

. . .

". . . [T]hroughout the period in question, there was numerous and constantly recurring openings for unskilled labor in a wide variety of fields of employment in and around Corpus Christi. . . . *Alvarez made no application for work to any private employer. It is our view that a condition precedent to any award of back pay is due diligence on the part of the discharged employee to find other work.*" (emphasis supplied)

American Bottling Co., 116 NLRB 1303, 1307 (1956)

". . . [S]o far as it appears from the record [her work] did not require any high degree of skill. Her rate of pay at the time of her discharge was 55 cents per hour. *She was not justified therefore in limiting her search to work involving the use of any special skill.*" (emphasis supplied)

Seamprufe, Inc., 106 NLRB 1143, 1143-1144 (1953)

In light of these precedents and the evidence recited above, the Board was presented with a number of questions which it should have decided, but never mentioned. Is total idleness throughout a year of plentiful job opportunities not *prima facie* evidence that the strikers had not sought interim employment? If that standing alone was not sufficient, is such an inference not obviously and necessarily raised by the added factor that, during this year, the strikers were

receiving extraordinarily large strike payments which they would have forfeited if they had worked in this interim?

Is the concession that Johnson "could not" accept interim employment on account of his union duties no proof whatever that he did not diligently seek employment or that he was unavailable for any employment?[1] And, when the Union's boldly asserted claim of right to require employees to refrain from work is coupled with its order that Bass was not to accept a job offer and Bass' admission that he and three other strikers rejected job offers to avoid interference with their strike activities, is there neither direct proof that these four refrained from seeking work nor valid circumstantial proof that others had refrained also—all at the behest of the Union?

When it was shown that the strikers restricted their registration with the Employment Security Commission and that Johnson admitted to that agency that he, and in effect his fellow strikers, had not sought interim employment, was some denial, explanation or rebuttal not required before the Board could assume as a matter of law that these strikers sought diligently for work in mitigation of damages? Even if there were less than four full-time jobs available at The Herald Publishing Company,[2] is the conceded fact that Johnson, Schuyler and Windham never asked for such work as was readily available to them not any proof that they failed to discharge their duty to seek work in mitigation of damages? Finally, was Bass' admission that he and those three

---

[1]It was conceded that striker Mathews was not entitled to backpay when he "was unavailable for employment due to illness" (65). The record contains no explanation of how employees who are unavailable for work due to union requirements have rights superior to those who are unavailable due to serious illness.

[2]This factual issue was not resolved by the Board.

had been solicited personally to work for The Herald Publishing Company, coupled with Johnson's equivocation about this subject and the trial examiner's finding that this work was suitable for them, not some proof that they had willfully rejected job offers which were personally made to them?[1]

The trial examiner avoided all of these crucial questions by advancing a new and completely different concept of law applicable in such cases. He dismissed the petitioner's contention by ruling that:

> "No showing was made by Respondent that any of the 'want ad' positions advertised in its newspaper were ever *personally* offered to any of the involved 13 former strikers. . . ." (137) (emphasis supplied).
>
> . . .
>
> "[T]he burden passes to 'the respondent to establish facts which would negative the existence of liability to a *given* employee or which would mitigate that liability.' (citations omitted) Respondent made no attempt at the hearing to show that any of the 'want ad' jobs were offered to any of the involved *given* former strikers. Respondent has accordingly failed to meet the burden of proof required of it. . . ." (138).

This, of course, is but another way of saying that these employees had no obligation whatever to seek any interim employment and totally contradicts this Court's ruling in the *Phelps Dodge* case, as well as the numerous precedents which have been handed down under such ruling.

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[1]The fact that there was contradiction (35) and equivocation (54) in this evidence certainly did not excuse the Board's ignoring it completely. It is the Board's duty to resolve such factual questions.

Moreover, even as to such mitigation as would be available to an employer under this novel ruling, the examiner seeks to impose upon employers a burden of proof which, except in the most extraordinary circumstances, would be impossible to carry. The fact that the petitioner had offered such proof in this case was ignored completely.[1]

The examiner dealt with the strike payments abstractly as if the issue with respect to them would be resolved by technical analyses and dictionary definitions, regardless of whether the employees were induced by such payments to refrain from mitigating damages. Thus, upon the basis of such reasoning, he concluded that these payments were not "earnings" and therefore constituted no defense against unmitigated payment by the petitioner (102-109). These deliberations of the trial examiner merely beg the question: *What difference does it make that strike payments may be, as he says, in the nature of "insurance"* (109), *if the receipt of them induced or enabled the strikers to refrain from discharging their duty to mitigate damages?*

Even if it were to be assumed *arguendo* that these strike payments were from an "insurance" program in the most literal sense, still there is no logical or legal basis for the trial examiner's ruling. His finding that these payments did not amount to "earnings," coupled with his refusal to consider whether such payments thwarted damage mitigation, necessarily means that, *as a matter of law,* employees are completely free to insure themselves against any need for

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[1]The examiner added that the "want ad positions here offered as a defense in mitigation of backpay were not suitable to the background of the 13 strikers. . . ." (139). The short answer to that is that the strikers had not so stated and the uncontradicted evidence was to the contrary.

working during a labor dispute and to take advantage of such insurance in comfortable idleness—the employer's right, to have them seek interim employment, to the contrary notwithstanding.

Surely more than a legal assumption is necessary to hold here that the idleness of these employees is not to be attributed to the obvious fact that they would *gain* by such idleness and *lose* by working. Such a holding could validly be made only upon the basis of substantial evidence to rebut that inference—evidence which is not in this record. The Board's failure to recognize this has resulted in an order which offers to strikers the prospect of collecting, through idleness, more than twice that which they would have earned at their jobs with the petitioner. When the payments ordered by the Board are added to what the employees have already received, that is precisely what has been held in this case.

The Board panel which considered the case expressed no disagreement with the petitioner's contentions that "... suitable jobs were available in the area as indicated by advertisements in [the petitioner's] newspapers" and that "the strikers failed to avail themselves of other employment during the liability period" (143). This defense was rejected with the assertion that:

> *"The Respondent failed, however, to show that the strikers did not seek these or other jobs.* We agree with the Trial Examiner, *therefore, that the Respondent has failed to meet its burden to establish facts which would negative the existence of liability to a given employee* or which would mitigate that liability" (143) (emphasis supplied).

It appears to the petitioner that this is merely a different way of stating the fallacy that circumstantial evidence is not to be regarded as proof by the Board in such cases, and that an employer can prove its defense only by *direct evidence* that job offers have been made *personally* to each given striker and have been rejected without justification. As to all of the other matters hereinabove referred to, the Board adopted the findings, conclusions and recommendations of the trial examiner without comment (142).

The Court panel below divided over the issues presented here. There was no disagreement among the judges over the analysis of the nature of strike benefits as such (Appendix, pp. 3a-8a, 15a-16a), and the ruling that these payments were "collateral." The petitioner is not now taking issue with that ruling. Like the Board, however, the panel majority refused to consider the important question of whether the Board had authority to rule as a matter of law that the strike payments did not induce employees to refrain from seeking interim work.[1]

In framing a second issue, the Court stated that the "Petitioner argues that Johnson's refusal to accept [the Rock Hill] job offer legally constituted a forfeiture of his right to

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[1]In analyzing the nature of the strike benefits, the majority stated that "the constitution and by-laws of the international union, not controverted by any other substantial evidence, established that a striker's first obligation was to seek interim earnings to reduce the drain on the strike benefit funds of the international union" (Appendix, pp. 3a-8a). With all due respect, this was patent error. The Board made no such finding — this proposition being mentioned for the first time in the Union's brief to the Court. The true issue was whether the employees sought interim employment and not whether their constitution said that they should have done so, and this Court has repeatedly admonished against courts of appeal engaging in factfinding. See, *e.g.*, *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 91 L. ed. 1995 (1947).

backpay" (Appendix, p. 9a). This is not correct. What the petitioner actually argued as to that incident was that Johnson and the Union had no right to justify Johnson's refusal of that job *on the ground that acceptance of it would have interfered with his strike duties,* and the Board had no right to endorse that proposition. The Company has never contended that Johnson should have accepted that job in spite of the distance to Rock Hill. The factor of distance was totally insignificant since it was shown that Johnson was not available for interim employment under any circumstances —this being the crucial factor which the panel majority also failed to take into consideration. Both as to this evidence and as to the evidence that others were unavailable also, the point is that strikers cannot collect pay from their employer for the very strike activities which they are conducting against him.

> "Of course, participation in an unfair labor practice strike can affect the amount of back pay recoverable insofar as the strike hampered the efforts of discharged employees to mitigate their damages by seeking new employment."
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> *Bon Hennings Logging Company v. National Labor Relations Board,* 308 F. 2d 548, 558 (9 Cir. 1962)

> "Normally, the Board does not award back pay to employees discriminatorily discharged while on strike; agency theory is that, until it appears that employees who desire work have given up the strike, no determination can be made that their loss of pay was conclusively attributable to their employer's conduct."
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> *Sakrete of Northern California, Inc.,* 140 NLRB 765 (1963)

The panel only considered one other phase of the case—that is, the question of who has the burden of proof in situations of this kind. Here, again, the Court was in error, since no such question has been involved in the case. It is clear from the record that the petitioner had established *prima facie* a defense against any requirement that it must pay unmitigated back wages. Not only was that the gist of the petitioner's argument to the Court, it was expressly stated, and repeatedly so, that the Company had gone forward with the evidence and, in so doing, had produced proof which required rebuttal from the General Counsel to sustain any ruling against the petitioner's contentions (Company's brief, pp. 4, 6-9, 27; Company's reply brief, pp. 11-12). This was summarized with the statement that, "Since the evidence here affirmatively shows that strikers incurred losses willfully, the Company does not need to rely on the authority of [the *Mastro Plastics* and *Rice Lake Creamery*] cases to support its position" (Company's brief, p. 27).

In spite of this, the panel majority attributed such a defense to the petitioner, declaring that, "it asserts that the burden of such proof was on the Board's General Counsel, petitioner contends that the Board's order in this regard must be set aside" (Appendix, p. 11a). With all due despect, the petitioner has never made any such contention.

The panel majority proceeded to resolve this "issue" by rejecting the principles advanced by the courts in *National Labor Relations Board v. Mastro Plastics Corporation,* 354 F. 2d 170 (2 Cir. 1965) *cert. den.* 384 U.S. 972, 86 S. Ct. 1862, 16 L. ed. 2d 682 (1966) and *National Labor Relations Board v. Rice Lake Creamery Company,* 365 F. 2d 888 (D.C. Cir. 1966) and by adopting the rationale of the court in *National Labor Relations Board v. Mooney Aircraft, Inc.,* 366 F. 2d 809 (5 Cir. 1966) (Appendix, pp. 12a-15a).

The petitioner's position with respect to these rulings of the panel majority is succinctly summarized in the dissenting opinion filed in the Court below. After noting the evidence which had been introduced by the petitioner and the circumstances inherent in the case the dissenting Judge stated that:

"In the instant case there was evidence as shown above that strikers had registered with the South Carolina Unemployment Security Office but represented themselves as available for work only of the same type in which they had been engaged. The Union had fixed the unemployment benefits based on a higher wage scale than that prevailing in the Florence area. Without some explanation, it is not illogical to conclude that the higher wage scale was selected so that the strikers' benefits might be increased and thus provide a more nearly adequate allowance to meet living expenses during the strike. Some of the strikers permissibly worked one full eight-hour shift in certain work weeks to supplement their income but by so doing their strike benefits were not curtailed.

"The Examiner and the Board would require the company to show that no jobs were ever personally *offered* to any of the strikers or that offers of such jobs were ever *rejected* by any of the strikers. It is my impression that this goes far beyond what this court has ever required or sanctioned. It is my conclusion that the company made out a *prima facie* case by showing the circumstances of registration with the unemployment agency, availability of acceptable jobs in the area and the other facts and circumstances which provide strong support for the inference that the Union was offering every inducement to these strikers to accept no jobs and to refrain from seeking interim employment the earnings from which would miti-

gate their loss of wages. The company satisfied the only reasonable burden which should be imposed upon it under the circumstances by making a *prima facie* showing of lack of due diligence on the part of the reinstated strikers to minimize their losses of earnings during the liability period. It should then be the duty and burden of the General Counsel to show what unsuccessful efforts had been made by the strikers to secure interim employment, whether comparable to otherwise. There was nothing offered to rebut the *prima facie* case" (Appendix, pp. 20a-21a).

The holding in *National Labor Relations Board v. Mooney Aircraft, Inc.*, 366 F. 2d 809 (5 Cir. 1966), relied upon by the panel majority here, surely is no support for the proposition that the employees in this case should not have been required to offer some evidence in rebuttal of what was shown against them before they could collect full back wages. The liability period under consideration in the *Mastro Plastics* case was only from July 14 to July 18. Moreover, the company there offered no evidence of any kind. Accordingly, there is no factual similarity in these two cases. The only surprising feature on the *Mooney* decision is that the court felt it necessary to express its disagreement with the *Mastro Plastics* decision in order to sustain its ruling. It could not naturally have been expected in that case that employees would have found interim employment in mitigation of damages in the liability period of four or five days.

Precisely the reverse is here, where the liability period covered approximately one year. It is in such a situation that the courts in the *Mastro Plastics* and *Rice Lake Creamery* cases ruled that employees must be called as witnesses as a condition precedent to their collecting unmitigated back wages.

". . . [I]nformation relevant to whether the discriminatees willfully incurred a loss of earnings is within the knowledge of the discriminatees, not the employer. While the employer must raise this issue of mitigation of damages in its pleadings, *it does not follow that the employer should be required to come forward with evidence by producing the discriminatees. Since one purpose of the back pay remedy is to compensate them only for actual losses, it is logically within the duty of the Board to produce at the hearing the evidence most relevant to this question—testimony by the discriminatees.* Furthermore, while the Board correctly argues that its primary concern is the public interest in promoting full production and employment by means of the back pay remedy, it is nevertheless the representative of the discriminatees. *If the discriminatees had to sue in their own right for back pay, they would obviously have to testify and be cross-examined* (emphasis supplied).

. . . .

"Because the Board does customarily produce the discriminatees at back pay hearings, we conclude that a rule requiring a discriminatee to testify before his award becomes final is not an undue burden on the Board and would not undermine the efficacy of the back pay remedy."

National Labor Relations Board v. Mastro Plastics Corporation, 354 F. 2d 170, 177 (2 Cir. 1965), *cert. den.* 384 U.S. 972, 86 S. Ct. 1862, 16 L. ed. 2d 682 (1966)

"The Company also objects to the award to Malcolm Demers and Basil Colbert, because they failed to appear at the supplemental hearing where the back pay data was adduced. . . . We think the amount should be held in escrow until the discriminatee can be produced to testify, or some other method adopted to enable the Company

adequately to inquire of him about matters which might mitigate the amount, if any, due to him, failing in which within a reasonable time the award must be disallowed. In this ruling we follow the reasoning of the Court of Appeals for the Second Circuit in *NLRB v. Mastro Plastics Corporation, supra.*"

National Labor Relations Board v. Rice Lake Creamery Company, 365 F. 2d 888, 891-892 (D.C. Cir. 1966)

It seems obvious that the Courts of Appeal for the Second and District of Columbia Circuits *merely held that a long period of unexplained unemployment raises an inference that there has been no search for employment.* This is entirely consistent with prior Board and court precedents. See, *e.g., National Labor Relations Board v. Moss Planing Mill Co.,* 224 F. 2d 702 (4 Cir. 1955); *Missouri Transit Company, Inc.,* 125 NLRB 1316 (1959); and *Seampruf, Inc.,* 106 NLRB 1143 (1953). Surely application of that requirement is more reasonable and necessary here where, in addition to a long period of idleness, as the dissenting Judge noted, there was "evidence tending to show a glaring display of disinterest on the part of the strikers in securing temporary employment, a disinterest sanctioned and encouraged, if not actually prompted and directed, by the Union; also evidence tending to show the intent of the strikers to disregard their legal obligation to minimize their losses of earnings" (Appendix, p. 16a).

Upon the basis of all the foregoing, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

D. LAURENCE MCINTOSH
J. W. ALEXANDER, JR.
Attorneys for the Petitioner

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 10,634.

Florence Printing Company,
Petitioner,

versus

National Labor Relations Board,
Respondent.

Charleston Typographical Union No. 43,
Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(Argued December 9, 1966. Decided March 21, 1967.)

Before SOBELOFF, BOREMAN and WINTER, Circuit Judges.

J. W. Alexander, Jr., (Alvin A. Coleman, Jr.; Blakeney, Alexander & Machen; and Wright, Scott, Blackwell & Powers on brief) for Petitioner, and Wayne S. Bishop, Attorney, National Labor Relations Board, (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, and Solomon I. Hirsh, Attorney, National Labor Relations Board, on brief) for Respondent, and George Kaufmann (Gerhard P. Van Arkel, on brief) for Intervenor.

WINTER, Circuit Judge:

In *Florence Printing Co. v. N.L.R.B.*, 333 F.2d 289 (4 Cir. 1964), we enforced an order of respondent which, *inter alia*, required petitioner to reinstate certain striking employees with back pay and interest. The striking employees had applied for reinstatement on July 7, 1963, but were not reinstated until approximately one year later. Even then, petitioner refused reemployment to one, and its refusal was upheld by the Board.[1] The Board's order, which petitioner now asks us to set aside and which the Board asks us to enforce, directed petitioner to pay certain designated amounts to twelve of the formerly striking employees as back pay and interest for the period July 7, 1963 to the date of reinstatement.[2] We think the Board's order should be enforced.

Enforcement of the order is resisted, in whole or in part, on three grounds. First, the striking employees, against whom unfair labor practices were previously found to have been directed, received, during the time petitioner refused to reinstate them, strike benefits paid by their union from a trust fund established for that purpose. It is contended that the amount of their backpay awards should be reduced by the amounts of the strike benefits. The wages that they would have earned, had they been reinstated on July 7, 1963 have been stipulated, as have the amounts of strike

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[1]Sustaining one of petitioner's exceptions to the examiner's recommended order, the Board refused to order the reinstatement of Romelous E. Bass, finding that Bass committed an unprovoked physical assault on one of petitioner's officials, and thus forfeited his right to reinstatement.

[2]Review and enforcement of the order are sought pursuant to the provisions of §§10(f) and 10(e) of the Act, respectively. 29 U.S.C.A. §§160(f) and 160 (e).

benefits.[3] Second, it is contended that as a question of law Glenn Johnson, one of the striking employees, forfeited his right to back pay by refusing a specific job offer in Rock Hill, South Carolina, a town one hundred miles distant from the place of his employment with petitioner. Third, it is contended that all of the employees wilfully incurred a loss of earnings and should, therefore, be denied back pay. This contention is grounded upon the assertion that the record discloses other job opportunities in Florence during the period in question, that it was the burden of General Counsel to the Board to present proof to explain why the strikers did not avail themselves of these opportunities and that he failed to meet that burden. We consider these contentions seriatim.

—SET-OFF OF STRIKE BENEFITS—

Before dealing with the legal question presented, we must first state additional facts. The benefits were paid from a trust fund established and administered by the international union and funded by a one per cent assessment on the earnings of active members.[4] By the international union's constitution and by-laws, benefits from the fund were payable *only* during strikes, lockouts and shutdowns. Benefits were scaled from 60% of regular pay for members having dependents to 40% for members not having dependents, with minimum weekly benefits of $36.00 and $24.00, respective-

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[3]The examiner, because he thought the amounts of strike benefits were excessive, expressed the belief that the record was erroneously transcribed. He invinted a motion to correct the transcript. No such motion has been made.

[4]The orginal assessment was made for a three-month period. At any time that the *res* of the trust fell below $500,000.00, the assessment once again became operative and remained in effect for three months after the *res* grew to $500,000.00.

ly. To be entitled to benefits, a member was required to report daily "to the proper officer of the subordinate union while the strike continues." Further, a striker refusing work while out on strike "shall be debarred from all benefits under this law, and for each day's work performed in excess of one shift one-fourth of the members' regular strike benefits for that week shall be deducted." Reserving its right to claim otherwise, the union reported benefits paid to the Internal Revenue Service as "income," and presumably withheld income taxes in appropriate cases. There was evidence before the trial examiner that strikers, *on days that they did not have other employment,* were required to picket and that strike benefits would be paid to strikers who were ill and were unable to report or picket.

Petitioner contends that the strike benefits were compensation for picketing services, so that the strike benefits were "earnings" to be set off against petitioner's liability for back pay. The examiner made an express factual finding, adopted by the Board, that there was an absence of evidence to show that services were rendered in exchange for the benefits, and hence concluded, as a legal question, that set-off was not proper. From our examination of the record as a whole, we find no factual basis to conclude that strike benefits were paid as a condition precedent to, or in compensation for, picketing. True, picketing was required of strikers not otherwise gainfully employed, but the constitution and by-laws of the international union, not controverted by any other substantial evidence,[5] established that a striker's

[5]There was evidence that Bass assigned lack of union permission to explain his refusal to accept a job offer. The job offer did not occur during the period in question and Bass' case is not before us, the Board having refused to order his reinstatement. There was no evi-

first obligation was to seek interim employment to reduce the drain on the strike benefit funds of the international union. We think the Board's factual conclusion was correct.

Whether, as a legal question, strike benefits which are not shown to be "earnings" should be set off against an award for back pay, in diminution thereof, has been directly decided in one case cited to us, *N.L.R.B. v. Rice Lake Creamery Company*, 365 F.2d 888 (D.C. Cir. 1966). As a matter of policy, the Board has adopted the common law "loss of earnings" rule, under which the measure of an employee's recovery is the earnings which he has lost, less any other earnings which he has obtained or wilfully refused to obtain. *Knickerbocker Plastic Co., Inc.*, 132 N.L.R.B. 1209 (1961); *Kartarik, Inc.*, 111 N.L.R.B. 630 (1955); *L. B. Hosiery Co., Inc.*, 99 N.L.R.B. 630 (1952); *Columbia Picture Corp.*, 82 N.L.R.B. 568 (1949). Since *Standard Printing Company of Canton*, 151 N.L.R.B. 963 (1965), strike benefits have been treated as an element *not* to diminish the amount of backpay award. In the case at bar, the Board, in applying the common law loss of earnings rule, again deemed the strike benefits as "collateral," having no effect to diminish an award for back pay. From the *Rice Lake* and other decided case in analogous situations, we think the Board reached the correct legal conclusion.

National Labor Rel. Bd. v. Gullett Gin Co., 340 U.S. 361 (1951), is the controlling authority. There, the question was raised as to whether the Board must deduct from backpay awards to discriminatorily discharged employees sums paid

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dence that refusal of such permission was general union policy. Indeed, strikers, during the period in question, accepted some interim employment.

to them as unemployment compensation by a state agency. In concluding that the Board was not required to give effect to such a set-off, the Court placed its decision on two grounds. Repeating its holding in *Marshall Field & Co. v. National Labor Relations Board,* 318 U.S. 253 (1943), it held that benefits received by employees under a state employment compensation act were plainly not "earnings." In the *Marshall Field* case the Court did not have before it the question of whether the Board had authority to make such an order, but that question was presented in the *Gullett Gin* case; and, as a second ground of the Court's opinion in the latter, it held that the Board had authority to adopt the policy of refusing to give effect to a set-off because the benefits were collateral and not direct.[6] Earlier, in *National Labor R. Board v. Brashear Freight Lines,* 127 F.2d 198 (8

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[6]In this regard, the Court said:

"Such action may reasonably be considered to effectuate the policies of the Act. To decline to deduct state unemployment compensation benefits in computing back pay is not to make the employees more than whole, as contended by respondent. Since no consideration has been given or should be given to collateral *losses* in framing an order to reimburse employees for their lost earnings, manifestly no consideration need be given to collateral benefits which employees may have received.

"* * * Payments of unemployment compensation were not made to the employees by respondent but by the state out of state funds derived by taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state. * * * We think these facts plainly show the benefits to be collateral. It is thus apparent from what we have already said that failure to take them into account in ordering back pay does not make the employees more than 'whole' as that phrase has been understood and applied." *Id.*, pp. 364-365.

Cir. 1942), it had been held that the amount of back pay ordered should not be reduced by the value of groceries furnished a striker and his family by the union at irregular intervals. In *N.L.R.B. v. Rice Lake Creamery Company, supra,* it was flatly held that the Board, in the exercise of its discretion, properly refused to deduct the amounts of strike benefits from gross back pay when some benefits were paid after picketing ceased and when the amount of the benefits was not entirely related to the hours of picketing. *Id.,* p. 893.

The only decision remotely in conflict with these cases is our own decision in *National Labor Rel. Board v. Moss Planing Mill Co.,* 224 F.2d 702 (4 Cir. 1955), in which we held that workmen's compensation payments should reduce the amounts payable under a backpay award. Notwithstanding the decision in *Gullett Gin* and the discussion contained therein concerning the fact that unemployment compensation benefits were financed by a state tax on employers, we thought that the fact that workmen's compensation benefits came from the employer through the medium of his agent, his insurance carrier, would unjustly enrich an employee if the benefits were not applied in diminution of the backpay award. That case has no application here, because, undisputably, the strike benefits were financed solely by an assessment on the employees. Employees receiving strike benefits receive back only their own contributions and those of fellow-employees.

Because strike benefits are funded solely by employee assessments, and because we find no evidence that any service on the part of the employee was required as a condition precedent to the receipt of strike benefits, we think that they must be treated like unemployment compensation benefits

and governed by the decision in the *Gullett Gin* case. *Gullett Gin* also disposes of another of petitioner's contentions, namely, that some employees may be made more than whole. In an individual case that may be so, yet—to mention only one possible collateral loss—we are aware that we are living in an age where consumer goods are generally acquired on credit. A protracted strike in protest for what has been found to be an unfair labor practice may well mean for many individuals that their equity in automobiles, household appliances, and the like, purchased on credit, has been wiped out. The back pay award does not take these factors into consideration and make no allowance thereof.[7] In short, as was said in *Gullett Gin*, back pay as ordered by the Board in this case does not make the employees "* * * more than 'whole' as that phrase has been understood and applied." *Id.*, p. 365.

— CLAIMED FORFEITURE BY GLENN JOHNSON —

During the period in question, Glenn Johnson, who was chapel chairman of the union at petitioner's establishment, received an offer of a permanent job at his trade at a salary of $115.00 per forty-hour week from the Evening Herald of Rock Hill, South Carolina. The offer came to him directly from the publisher of the paper; Johnson's previous experience with job offers was that they emanated from foremen. Rock Hill is one hundred miles from Florence. Johnson, who was thirty-four, and his wife were both natives of Florence. They were buying a house, and had two young children, one

[7] *Cf. N.L.R.B. v. Rice Lake Creamery Company, supra,* which sustained an order to pay hospital and medical expenses incurred by employees during a strike when the employer suspended its contribution to group medical and hospital insurance.

of whom attended school in Florence. Before refusing the job offer, Johnson conferred with union officials.

Petitioner argues that Johnson's refusal to accept this job offer legally constituted a forfeiture of his right to back pay. The trial examiner and the Board found otherwise. While the trial examiner found that Johnson was suspicious, as a result of the offer's being made by a publisher rather than a foreman, that its ultimate purpose was to remove him from a position of leadership in the strike, the examiner's legal conclusion that Johnson did not forfeit his right to back pay was grounded upon the distance between Rock Hill and Florence, and the disruptive effect of the move on his family and his position in the Florence community.

As we pointed out in *Mooresville Cotton Mills v. National Labor R. Board*, 110 F.2d 179 (4 Cir. 1940), a wrongfully discharged employee cannot recover damages for losses which, in the exercise of due diligence, he could have avoided; but we recognized also that he may refuse to accept other employment which is dangerous, distasteful or essentially different from that for which he is employed. We added, "* * * nor is he necessarily obliged to accept employment at a distance from his home," and that "* * * it is for the Board to determine whether, under the evidence, the location is a factor which may be reasonably taken into account." *Id.*, p. 181. Our conclusion was that in each case, whether an employee acted reasonably or not in accepting or seeking a particular employment, was a question of fact.

Under the evidence we have recited, the Board's conclusion that Johnson was not unreasonable in refusing the job offer is fully supported by the record considered as a whole. Whether Johnson's suspicions about the motive for his em-

ployment because of the source from which the offer originated was a permissible inference, we need not decide. We do conclude that the necessity of selling his home, removing his child from school, and abandoning the community of which he and his wife were natives, was a sufficient basis on which the Board could determine that his refusal was not unreasonable.

— WILFUL LOSS OF EARNINGS BY ALL EMPLOYEES —

Our examination of the record as a whole satisfies us that the examiner's decision, adopted in essential respects by the Board, correctly and succinctly summarized the evidence on which petitioner relies to establish that all of the employees wilfully refused other available employment and thus forfeited their right to back pay. The examiner said:

> "The testimony of J. J. O'Dowd, publisher of the Respondent's Florence Morning News, establishes that the 13 former strikers whose back pay is here involved were either journeymen or apprentices in the typographical trades. All of the 13 strikers were members of the Charging Party and International Typographical Union which limit membership to journeymen and apprentices.
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> "Mr. O'Dowd's testimony further shows that numerous 'Help Wanted' ads appeared in his daily newspaper during Respondent's liability period advertising for help in occupations unrelated to the typographical trades, such as store and filling station managers and store clerks. The salaries offered for these advertised jobs ranged from about $40 to $65 per 40 hour week as against the $96 per 40 hour week at $2.40 per hour paid by Respondent to its journeymen and $1.25 and upwards paid apprentices in the liability period.

"No showing was made by Respondent that any of the 'want ad' positions advertised in its newspaper were ever personally offered to any of the involved 13 former strikers or that any offers of such positions were ever rejected by any of the 13 former strikers."[8] (footnote added)

The examiner's and the Board's decision on this point thus proceeded from a lack of evidence to show that any employee either sought, or having sought, was refused any job opportunity in the Florence market. Because it asserts that the burden of such proof was on the Board's General Counsel, petitioner contends that the Board's order in this regard must be set aside.

At the outset, we are met by the counter argument by the Board that this legal issue was not presented to it in accordance with §10(e) of the Act, 29 U.S.C.A. §160(e) and that we should not consider it.[9] We have been furnished with

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[8]The Board's supplemental decision discussed this aspect of the case. "The Respondent contends that although suitable jobs were available in the area, as indicated by advertisements in its newspapers, the strikers failed to avail themselves of other employment during the liability period. The Respondent failed, however, to show that the strikers did not seek these or other jobs. We agree with the Trial Examiner, therefore, that the Respondent has failed to meet its burden to establish facts which would negative the existence of liability to a given employee or which would mitigate that liability." (citation omitted)

[9]Section 10(e) of the Act, in pertinent part, provides: "No objection that has not been urged before the Board, its members, agent or agency, shall be considered by the Court, unless failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Section 10(e) has been given full effect according to its terms in *Marshall Field & Co. v. Board, supra; Labor Board v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961); *Labor Board v. Seven-up Co.*, 344 U.S. 344 (1953); *N.L.R.B. v. Kotarides Baking Co.*, 340 F.2d 587 (4 Cir. 1965); *N.L.R.B. v. Community Motor Bus Company*, 335 F.2d 120 (4 Cir. 1964); and *National Labor Relations Board v. Pugh and Barr, Inc.*, 194 F.2d 217 (4 Cir. 1952).

a copy of petitioner's exceptions to the examiner's proposed decision and it does not appear that the argument as such was made. Petitioner did, however, except to the examiner's determination "that the failure of strikers to seek or accept jobs from other employers during the period of the Respondent's liability is no defense whatever against payment of the full amount of back wages claimed * * *." Petitioner filed no brief with the examiner, and its discussion of this exception to the Board did not argue in so many words the question of on whom was the burden of proof. However, the significance of an absence of proof is so intertwined with the question of on whom was the burden of proof that we cannot say that §10(e) of the Act was ignored. Resolving any doubt we may have on this subject in favor of petitioner, we prefer to address ourselves to the merits of the basic question.

Petitioner relies on *N.L.R.B. v. Mastro Plastics Corporation*, 354 F.2d 170 (2 Cir. 1965), which held that where the issue of wilful loss of earnings is raised by the employer, General Counsel must, as part of the Board's *prima facie* case, present testimony from the employees regarding their search for an interim employment during the liability period.[10] Although the Board argues that the Court's decision in this regard was *sua sponte* without the benefit of briefs by the parties, it has been cited with approval in *N.L.R.B. v. Rice*

[10]In *Mastro* the Board's order required the back pay award to claimants to be placed in escrow until the employer had a reasonable oportunity to examine them. When one of the employees did not come forward to testify, the Board nevertheless ordered his award paid to him. While the Court treated the rule that the burden of proving matters of defense, such as wilful failure to accept employment, rested on the employer as established by law, it, nevertheless, held the burden of going forward with evidence to combat the defense rested on General Counsel. It, therefore, refused to enforce the part of the order requiring direct payment.

Lake Creamery Company, supra, in its holding that an award of back pay to two discriminatees, who did not appear at the enforcement hearing, should be placed in escrow pending their appearance.

Conversely, the Fifth Circuit has refused to follow *Mastro.* In *N.L.R.B. v. Mooney Aircraft, Inc.,* 366 F.2d 809 (5 Cir. 1966), the Court analyzed the Second Circuit's holding and reasoning, saying:

"The Second Circuit's reasoning would lead to the conclusion in this case that the Board should carry the burden of going forward on the issue of interim earnings. Information relevant to establishing the amount of an employee's income during the period of an unlawful discharge is more readily available to the employee than to the employer. On this precise point the *Mastro* decision is in conflict with the Eighth Circuit's decision in NLRB v. Brown & Root, Inc., supra.[11] The Court there held that since interim earnings mitigated the employer's liability as fixed by the Board, the issue was an affirmative defense and the Board's failure to produce the employees' testimony was not fatal to its case.

"We think that the Board need not produce the testimony of each and every employee. First, we are not entirely convinced that the employees' knowledge about their efforts to find interim work and the financial success they encountered can realistically be imputed to the Board. More important, to require the Board to call every employee in every case would place an intolerable burden on the agency, particularly where large numbers of employees were involved and there was little basis to dis-

[11] 311 F.2d 447 (8 Cir. 1963).

pute the Board's calculations. A better rule would leave the burden on the employer, who could produce the employees' testimony whenever necessary to dispute the Board's figures, but who certainly would not find it necessary to call every employee involved. We conclude, however, that the employer should be given every opportunity to call the employees to testify on the issue of their interim earnings, and that upon the employer's request, the Board should make available any information in its possession relevant to the whereabouts of the employees. When the Board calls an employee, it must, of course, permit the employer to cross examine him on any relevant matter. NLRB v. Miami Coca-Cola Bottling Co., supra." (original footnotes omitted; footnote 11 supplied) *Id.*, pp. 813-814.

We are persuaded that *Mooney Aircraft* expresses the correct view and that we should follow it. As it, *Mastro, N.L.R.B. v. Miami Coca-Cola Bottling Company*, 360 F.2d 569 (5 Cir. 1966), *N.L.R.B. v. Ellis and Watts Products, Inc.*, 344 F.2d 67 (6 Cir. 1965), *Nabors v. N.L.R.B.*, 323 F.2d 686 (5 Cir. 1963), *cert. den.*, 376 U.S. 911 (1964), *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 447 (8 Cir. 1963), and *National Labor Relations Board v. J. G. Broswell Co.*, 136 F.2d 585 (9 Cir. 1943), conclusively demonstrate, the defense of wilful loss of earnings is an affirmative defense and the burden of proving it rests on the employer. To say that the opponent of one who has the burden of proof, nevertheless, has the burden of producing evidence for his adversary is in reality to shift the burden of proof. This we are unwilling to do in light of overwhelming authority that the burden of proof rests on the employer. With the Fifth Circuit, we agree that the employer should have ever oppor-

tunity to interrogate employees, under oath, and to obtain the Board's information of their whereabouts. We would add that the employer, upon application therefor before the examiner, should have full discovery of information in the possession of General Counsel indicating any interim earnings, although we assume that where interim earnings are known, General Counsel would disclose them as part of his case.

In this case, the record shows that many of the affected employees were present at the hearing before the examiner. Indeed, it was necessary to excuse most of them so that petitioner's daily newspaper deadline could be met. At no time did petitioner, through its counsel, evince any desire to examine any employee, except Bass and Johnson, as to interim earnings. Each of the other employees had been reinstated by petitioner prior to the hearing before the examiner, so that petitioner was well aware of the whereabouts of those not present at the hearing.

Under the law as we preceive it, and the circumstances we have stated, we find no merit in petitioner's contention. We conclude that the Board's determination that there was not wilful failure on the part of employees to accept other employment is supported by the record as a whole, as is the Board's determination of the amount of backpay award to each employee.

ORDER ENFORCED.

BOREMAN, Circuit Judge, concurring in part and dissenting in part:

I join in the decision to reject the contention of the company that strike benefits provided by the Union's trust fund should be set off against an award of back pay to the strik-

ers. I concur also in the disposition of the issue discussed under the heading "CLAIMED FORFEITURE BY GLENN JOHNSON." I agree that it would be unreasonable to hold that Johnson was required to travel a distance of 100 miles from Florence to Rock Hill to accept employment, even on a temporary basis, in mitigation of loss of earnings.

My principal concern is with respect to that portion of the majority opinion headed "WILFUL LOSS OF EARNINGS BY ALL EMPLOYEES" and the majority decision on the merits of the basic question there discussed. I conclude that detailed discussion of the evidence by me in noting disagreement would avail nothing.

The company's primary contention, as I understand it, is that the Examiner and the Board ignored and failed to give any consideration to evidence tending to show a glaring display of disinterest on the part of the strikers in securing temporary employment, a disinterest sanctioned and encouraged, if not actually prompted and directed, by the Union; also evidence tending to show the intent of the strikers to disregard their legal obligation to minimize their losses of earnings. The majority opinion recognizes the generally accepted rule that a striking employee's loss of wages should be reduced by earnings which he has obtained or *wilfully refused to obtain.*

By way of summarization, there was at least some evidence which would show the following:

1. Without any explanation the Union elected to base the amount of strike benefits on a percentage of the wage scale then prevailing in Columbia, South Carolina, which was higher than the wage scale to which the strikers were accustomed and which was in effect in the Florence area;

2. The Union invoked its rule that if a striker worked at interim employment more than one eight-hour shift in one work week his weekly strike benefits would be subject to drastic curtailment;

3. All or some of the strikers had registered with the South Carolina Unemployment Security Office and represented themselves as available *only for the same type of work in which they had been regularly engaged,* thus insuring a distinct limitation of job availability and opportunity;

4. There was work available in the Florence area as shown by newspaper advertisements of jobs such as store clerks, service station managers and attendants;

5. One or more of the strikers was or were under explicit orders from the Union to accept no steady employment;

6. Certain of the employees did actually work as much as one eight-hour shift out of each week in jobs quite comparable to their regular employment and their right to receive full strike benefits was not thereby affected;

7. All strikers, unless ill or otherwise unavailable, were required to report daily to the picket line.

The majority opinion quotes from the decision of the Examiner and, in footnote 8, from the Board's supplemental decision, and directs attention to the fact that both decisions "proceeded from a lack of evidence to show that any employee either sought, or having sought, was refused any job opportunity in the Florence market." The majority apparently would uphold the Board in imposing a burden on the employer which, in my opinion, would be impossible of performance except in rare instances and under extraordinary circumstances.

The majority would reject the decision of the Second Circuit in *N.L.R.B. v. Mastro Plastics Corporation*, 354 F.2d 170 (1965), to the effect that where the issue of wilful loss of earnings is raised by the employer General Counsel must, as part of the Board's *prima facie* case, present testimony from the employees regarding their search for interim employment during the liability period. *Mastro* was cited with approval by the District of Columbia Circuit in *N.L.R.B. v. Rice Lake Creamery Co.*, 365 F.2d 888 (1966). Instead, my brothers adopt as controlling here the Fifth Circuit decision in *N.L.R.B. v. Mooney Aircraft, Inc.*, 366 F.2d 809 (1966), with all its implications. I prefer to follow what I believe to be the rule as established by earlier decisions of this court and to apply it in the light of the facts and circumstances as here disclosed by the evidence.

In the case before us there was evidence of employment opportunities in the Florence area indicating a ready labor market. Prospective employers were resorting to newspaper advertising in their efforts to obtain help. The advertised jobs were neither dangerous nor degrading. True, they were not in the same line of work as that in which the strikers had been engaged but this court has long since rejected the idea that strikers or wrongfully discharged employees can sit idly by and ignore job opportunities which are not comparable in all respects with their regular employment and then claim that they had met their obligation to minimize their loss of earnings. *Mooresville Cotton Mills v. National Labor R. Board*, 110 F.2d 179 (1940), was decided by this court in an entirely different context. There involved was the question whether certain striking employees were entitled to reinstatement which had been refused on the ground that they had obtained other "regular and substantially similar em-

ployment" and had thereby lost their former status of employees with right to reinstatement. Naturally, consideration was given to the question whether other kinds of work were equivalent to the work in which they had been regularly engaged. As the majority opinion in the instant case points out, this court held that a wrongfully discharged employee cannot recover damages for losses which, *in the exercise of due diligence,* he could have avoided. In context, it was logical to conclude that he should not be required to accept equivalent employment which would tend to distroy his employee status and, consequently, his right to be returned to his former position.

But consider and compare this court's decision in *N.L.R.B. v. Moss Planing Mill Co.,* 224 F.2d 702 (1955), in which it was held that mill employees were required to accept available agricultural jobs, working in tobacco fields, in order to minimize their loss of earnings. In that case the Examiner had found only that an employee did not have to accept an agricultural job because it was manifestly not equivalent to the position the employee had held. The court said, page 705, "and we are convinced, from a study of the record, that Wynne could readily have earned, *had he made reasonable efforts to obtain suitable employment,* much more than the utterly insignificant sum found by the Board." (Emphasis added.) This court disagreed with the Board's conclusion that an employee was not obligated to seek and accept agricultural employment which was not equivalent to his regular employment and held that the amount awarded by the Board must be reduced by a sum equal to what he would have earned *had he made a reasonable effort to secure employment of a nature which he was abligated to seek and accept.*

Consider and compare also the decision of this court in *N.L.R.B. v. Pugh & Barr, Inc.*, 207 F.2d 409 (1953). At page 410 the court said:

> "The Board seems to have reached the conclusion that it did on the basis that Bramer, having registered with the state unemployment agency, was not bound to make any further showing of diligence. *We do not think that this is sufficient.* The awarding of so large a sum as back pay without the finding of special circumstances justifying it cannot be sustained. We shall accordingly set aside the Board's order and remand the case to the Board with direction that it make specific findings of fact with respect to the matter and award to Bramer no more than the difference between what he could have earned by working for respondent if he had not been wrongfully discharged and what he could have earned elsewhere *if he had used due diligence to secure other employment.*" (Emphasis supplied.)

Implicit in that case is the holding that it was up to the employee (or General Counsel) to make a showing of due diligence to obtain other employment.

In the instant case there was evidence as shown above that strikers had registered with the South Carolina Unemployment Security Office but represented themselves as available for work only of the same type in which they had been engaged. The Union had fixed the unemployment benefits based on a higher wage scale than that prevailing in the Florence area. Without some explanation, it is not illogical to conclude that the higher wage scale was selected so that the strikers' benefits might be increased and thus provide a more nearly adequate allowance to meet living ex-

penses during the strike. Some of the strikers permissibly worked one full eight-hour shift in certain work weeks to supplement their income but by so doing their strike benefits were not curtailed.

The Examiner and the Board would require the company to show that no jobs were ever personally *offered* to any of the strikers or that offers of such jobs were ever *rejected* by any of the strikers. It is my impression that this goes far beyond what this court has ever required or sanctioned. It is my conclusion that the company made out a *prima facie* case by showing the circumstances of registration with the unemployment agency, availability of acceptable jobs in the area and the other facts and circumstances which provide strong support for the inference that the Union was offering every inducement to these strikers to accept no jobs and to refrain from seeking interim employment the earnings from which would mitigate their loss of wages. The company satisfied the only reasonable burden which should be imposed upon it under the circumstances by making a *prima facie* showing of lack of due diligence on the part of the reinstated strikers to minimize their losses of earnings during the liability period. It should then be the duty and burden of the General Counsel to show what unsuccessful efforts had been made by the strikers to secure interim employment, whether comparable or otherwise. There was nothing offered to rebut the *prima facie* case. I would remand the case to the Board for further exploration and consideration of these matters and for this reason I respectfully offer this note of dissent.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 263

FLORENCE PRINTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–21a) is not yet reported. The Board's decision and order (J.A. 96–144)[1] are reported at 158 NLRB No. 1.

JURISDICTION

The decision and judgment of the court of appeals (Pet. App. 1a–15a) were entered on March 21, 1967. The petition for a writ of certiorari was filed on June 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "J.A." references are to the joint appendix filed in the court of appeals.

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer failed to prove, as a defense in mitigation of a backpay award, that the backpay claimants had willfully incurred losses of earnings.

STATUTE INVOLVED

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), is set forth in the Appendix, *infra*, p. 11.

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

In *Florence Printing Co.*, 145 NLRB 141, the Board found that the petitioner (a South Carolina printer) had unlawfully refused to bargain with the Union,[2] the representative validly designated by a majority of its employees, and that a strike by petitioner's employees as a result of this refusal was an unfair labor practice strike. The Board ordered petitioner to bargain with the Union, to offer reinstatement to the unfair labor practice strikers within five days of their application, and to make them whole for any losses of pay resulting from the failure to make such reinstatement. The Fourth Circuit enforced the Board's order in full. *Florence Printing Co.* v. *National Labor Relations Board*, 333 F. 2d 289.

On July 7, 1963, following the Board's order, the unfair labor practice strikers unequivocally applied for reinstatement, but they were not reinstated until June 30, 1964 (J.A. 93; 3–4). The Board instituted the

[2] Charleston Typographical Union No. 43.

instant proceeding, pursuant to Section 102.52 *et seq.* of its Rules and Regulations (29 C.F.R. § 102.52), to determine the amounts of back pay due to these employees.

At the hearing the parties stipulated the amounts of net back pay due each claimant, subject to certain affirmative defenses which petitioner sought to establish in mitigation of these amounts, and also stipulated the amount of strike benefits received by each claimant from the Union (J.A. 99–100; 102–103; 4–13).[3] Petitioner then presented the following evidence in support of its affirmative defense that the claimants had willfully incurred losses of earnings: general proof that the local newspaper had advertised job openings for clerks, store managers, and filling station workers, at $40 to $65 per week, during the backpay period (J.A. 137, 21);[4] that claimant Glenn Johnson had refused to accept a job in a town 100 miles from Florence during the backpay period (J.A. 135–136; 51–57, 22–24);[5] that Johnson, upon register-

[3] Pursuant to its constitution and by-laws, the Union paid strike benefits to members participating in an authorized strike (J.A. 103–105). These benefits were paid from a fund compiled by taxing all members of the International Union (J.A. 103–104, 108–109). A striker received no benefits if he inexcusably refused interim employment, and, if he obtained interim employment, his benefits were reduced by one-fourth for each day's work performed in excess of one shift (J.A. 105).

[4] The claimants involved here were either journeymen or apprentice printers. Journeymen printers at petitioner's plant received $96 per week at the time of the events herein (J.A. 139; 19–20).

[5] Petitioner also showed that claimant Bass refused to accept an equivalent job. This offer was not made during the backpay period, however, but before the employees abandoned the strike and applied for reinstatement (J.A. 129–135; 26). Bass was denied back pay for other reasons (J.A. 142–143).

ing at the State Employment Security Commission during the backpay period, informed officials there that he had applied for work only with petitioner and another newspaper and did not know whether any other claimants had sought other employment (J.A. 39–42). Petitioner did not attempt to show that equivalent jobs for printers were available in the Florence area, and made no attempt to show that the claimants had failed to seek the jobs petitioner contended were available (J.A. 143, 137–138). Nor did petitioner attempt to adduce evidence from the claimants with regard to their search for employment, although all had been reinstated by that time and most of them were present during the hearing (J.A. 18–19, 48–49).

The Board concluded that the evidence adduced by the petitioner was insufficient to prove that any of the claimants had willfully incurred a loss of earnings. It found that petitioner did not show, or even attempt to show, that the claimants did not seek the jobs which petitioner contended were available and equivalent, or any other jobs (J.A. 143, 137–139). The Board further found that claimant Johnson did not incur a willful loss of earnings in declining to accept a job in a town 100 miles distant, since to do so would require him to sell his home in Florence, where he and his wife had lived all their lives, and move with their school-age children to a new town (J.A. 136; 56–57, 52).[4] Accordingly, the Board ordered peti-

[4] The Board also found that strike benefits received by the claimants from the Union's strike fund were collateral benefits, and thus were not "earnings" deductible from gross back pay (J.A. 105–109, 143–144). The court of appeals unanimously

tioner to pay the net backpay amounts as stipulated (J.A. 144, 140, 100).[1]

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals (with Judge Boreman dissenting) agreed with the Board that there was "lack of evidence to show" a willful loss of earnings on the part of the claimants. Accordingly, the court held that the Board's backpay determination was supported by the record as a whole, and enforced its backpay order in full. (Pet. App. 11a, 15a).

ARGUMENT

Section 10(c) of the Act empowers the Board to award back pay to employees who have been the victims of discrimination. It is plainly established that "[t]he employee is entitled to receive what he would have earned normally during the period of the discrimination against him, less what he actually earned in other employment during that period." *National Labor Relations Board* v. *Brown & Root, Inc.*, 311 F. 2d 447, 452 (C.A. 8). However, "[s]ince only actual losses should be made good, * * * deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 198. The courts of appeals which have con-

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agreed with the Board on this issue (Pet. App. 3a–8a), and petitioner expressly "is not now taking issue with that ruling" (Pet. 21).

[1] The Board's order provided for the payment of back pay to 12 employees, in amounts ranging from about $5300 to $3400 (J.A. 100).

sidered the matter all have agreed that the burden is upon the employer to prove that the employee's actual earnings should be adjusted to reflect a willful loss of earnings,[8] and petitioner does not appear to dispute that principle here. Rather, petitioner's basic contention is that the Board and the court below erred in concluding that it had not sustained its burden of

[8] In addition to the decision of the court below in this case (Pet. App. 14a), see *National Labor Relations Board* v. *Brown & Root, Inc.*, *supra*, 311 F. 2d at 453–454; *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, 366 F. 2d 809, 813 (C.A. 5); *National Labor Relations Board* v. *Miami Coca-Cola Bottling Co.*, 360 F. 2d 569, 575 (C.A. 5); *Nabors* v. *National Labor Relations Board*, 323 F. 2d 686, 692 (C.A. 5), certiorari denied, 376 U.S. 911; *National Labor Relations Board* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 178 (C.A. 2), certiorari denied, 384 U.S. 972; *National Labor Relations Board* v. *Ellis & Watts Products, Inc.*, 344 F. 2d 67, 69 (C.A. 6); *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 597 (C.A. 9).

Although accepting the general principle that the burden of proving willful loss is on the employer, there is a disagreement among some of the courts of appeals as to whether the Board's General Counsel is obliged first to produce the discriminatees at the backpay hearing and present testimony regarding their search for interim employment. The court below, accepting the view of the Fifth Circuit in *National Labor Relations Board* v. *Mooney Aircraft, Inc.*, *supra*, 366 F. 2d at 813–14, held that there was no such obligation on the General Counsel (Pet. 14a). But cf. *National Labor Relations Board* v. *Mastro Plastics*, *supra*, 354 F. 2d at 177–178; *National Labor Relations Board* v. *Rice Lake Creamery Co.*, 365 F. 2d 888, 891–892 (C.A.D.C.). No need exists for this Court to resolve that conflict at this time. As petitioner acknowledges (see n. 9, *infra*), it raised no burden of proof issue in this case. Moreover, as the court below noted (Pet. App. 15a), "many of the affected employees were present at the hearing before the examiner"; "petitioner was well aware of the whereabouts of those not present at the hearing"; and, "[a]t no time did petitioner, through its counsel, evince any desire to examine any employee, except Bass and Johnson [both of whom testified], as to interim earnings."

establishing a *prima facie* case of willful loss.[6] This raises only an evidentiary issue, which does not warrant review by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502–503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491.

In any event, the record amply supports the conclusion of the Board and the court below that petitioner failed to sustain its burden of proving willful loss of earnings by the 12 claimants here involved. As the court below pointed out (Pet. App. 10a–11a), the Board found that the publisher of petitioner's newspaper merely testified that there were numerous "Help Wanted" ads "for help in occupations unrelated to the typographical trades, such as store and filling station managers and store clerks," and at salaries substantially below those received by the company's journeymen printers; moreover, there was no showing "that any of the 'want ad' positions advertised in its newspaper were ever personally offered to any of the * * * former strikers or that any offers

[6] Thus, as petitioner states (Pet. 23):

"It is clear from the record that petitioner had established *prima facie* a defense against any requirement that it must pay unmitigated back wages. Not only was that the gist of the petitioner's argument to the [court of appeals], it was expressly stated, and repeatedly so, that the Company had gone forward with the evidence and, in so doing, had produced proof which required rebuttal from the General Counsel to sustain any ruling against the petitioner's contentions. * * * This was summarized with the statement that, 'Since the evidence here affirmatively shows that strikers incurred losses willfully, the Company does not need to rely on the authority of [the *Mastro Plastics* and *Rice Lake Creamery*] cases to support its position' * * *."

of such positions were ever rejected by [them]." These findings are not undermined by the contentions presently advanced by petitioner.

Petitioner's assertion that claimant Johnson admitted before the State Employment Security Commission that the other claimants "had not sought interim employment" (Pet. 17) is belied by the record; it shows that Johnson stated that he did not know whether or not the others had sought interim employment (J.A. 41).

There is also no merit to petitioner's assertion (Pet. 5, 11, 17, 22, 27) that the Union ordered strikers not to accept other employment during the backpay period. Petitioner points out that the Union would not release claimant Bass to accept a job offer at the Dillon Herald, and that claimant Johnson testified he could not take a job because of his union activities. But, the record shows, and the Board found, that the job offer was not made to Bass during the backpay period, but in April 1963, when the employees were in the midst of their strike activities (J.A. 128–132).[10] Since the company was under no obligation to make the employees whole at the time the Dillon offer was made to Bass, he was under no obligation to take the job and the Union cannot be faulted for encouraging him to continue his strike activities. Moreover, the fact that the Union encouraged an employee not to take another job while the membership was engaged in concerted strike activities does not establish

[10] The employees did not abandon the strike and apply for reinstatement until July 7, 1963, at which time the backpay period began (J.A. 26).

that it would, or did, likewise restrain employees after the strike was abandoned. See *Brown & Root, Inc.*, 132 NLRB 486, 497, enforced, 311 F. 2d 447 (C.A. 8). Similarly, Johnson's testimony that he could not take a job because of his position with the Union was limited to the period when the employees were on strike (J.A. 54–55). There is no indication in the record that he would not accept another job after the strike was abandoned.[11]

There is likewise no merit to petitioner's assertion that claimants Bass, Johnson, Windham and Schuyler "were personally and individually solicited to accept full-time work by The [Dillon] Herald Publishing Company and that they rejected such job offers" (Pet. 9). Herald official Jackson, petitioner's own witness and the man purportedly offering the jobs, testified that *only* Bass was solicited for the job (J.A. 35).

Finally, petitioner's contention (Pet. 6, 21) that the payment of strike benefits encouraged the claimants not to seek work is irrelevant to the issue here. The question to be determined is whether the claimants *in fact* willfully refused to seek substantially equivalent jobs, not why they *might have been* so motivated. The Board found that there was in fact no willful refusal, and its determination in this regard was properly upheld by the court of appeals, as being based on substantial evidence. Accordingly, no further review is warranted.

---

[11] In fact, Johnson did consider another job during the backpay period, but declined it because he "was involved here and it was a hundred miles distance" (J.A. 53). Nothing in the record indicates, as petitioner contends (Pet. 21–22), that the Union prohibited Johnson from accepting this job.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

THURGOOD MARSHALL,
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ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

WAYNE S. BISHOP,
Attorney,
National Labor Relations Board.

JULY 1967.

APPENDIX

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*) is as follows:

> Sec. 10 * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

U.S. GOVERNMENT PRINTING OFFICE: 1967

SUPREME COURT, U. S.

FILED

JUL 19 1967

JOHN F. DAVIS, CLERK

No. 263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FLORENCE PRINTING COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

and

CHARLESTON TYPOGRAPHICAL UNION No. 43,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MEMORANDUM IN OPPOSITION FOR CHARLESTON TYPOGRAPHICAL UNION NO. 43

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

IN THE

Supreme Court of the United States

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---

MEMORANDUM IN OPPOSITION FOR CHARLESTON TYPOGRAPHICAL UNION NO. 43

Charleston Typographical Union No. 43, the charging party before the National Labor Relations Board, and intervenor in the Court of Appeals, joins the Board in urging that certiorari be denied in this

case. We shall not reiterate the discussion in the Board's Brief in Opposition which shows that the issues tendered by the Petition are purely evidentiary and therefore do not warrant this Court's consideration. However, at one point of its Petition (p. 7), and contrary to the language of the Questions Presented themselves and the main argument in the body of the Petition (pp. 7-27), the company claims that certiorari should be granted to resolve a conflict among the circuits regarding the procedures to be followed in back-pay proceedings. It may clear the air, therefore, to point out that the contention is not open to the company, because 1) it was not properly raised before the Board, and 2) it was deliberately abandoned in the Court of Appeals.

1. As the Court of Appeals said:

> "At no time did petitioner, through its counsel, evince any desire to examine any employee, except Bass and Johnson, as to interim earnings. Each of the other employees had been reinstated by petitioner prior to the hearing before the examiner, so that petitioner was well aware of the whereabouts of those not present at the hearing." (Pet. p. 15a)

Thus, quite aside from the requirements of § 10(e) of the Act, which the Court below assumed were met, the company was disqualified from raising this issue by the principle "that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

2. In its reply brief in the Court of Appeals (pp. 3-4) the company argued:

> The Company cited and quoted from those cases for the expressly limited purpose of supporting the logic of the position which the Company has maintained throughout this case. But, as pointed out above, the defense which the Board attacks as being unsound and also attacks as being now unavailable to the Company, namely, the principle of the *Mastro Plastics* and *Rice Lake Creamery* cases, is not the defense which the Company relies on in the present case. Thus the Board sets up a straw man and busies itself trying to knock it down.
>
> At least one-third of the Board's brief is devoted to its efforts to get the Court to disapprove *Mastro Plastics* and *Rice Lake Creamery,* even though that is precisely what the Supreme Court refused to do when it denied the Board's petition for certiorari in *Mastro Plastics* case.[*] There is no good reason for involving this Court in such a controversy as that, and no useful purpose will be served by it.
>
> The main point and crux of the Company's appeal is that the Board has erroneously ignored pertinent and fundamental *evidence,* it has wrongfully failed to resolve differences or conflicts in relevant *evidence,* and it has failed to draw inferences obviously required by *evidence*—all in dereliction of its duty as the exclusive fact finder. (Emphasis in original.)

Thus, the company itself has recognized that the case raises only evidentiary issues. These were de-

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* A petition for certiorari was filed by Mastro Plastics, raising other issues, and was denied by this Court. 384 U.S. 972. The Company erroneously attributed that Petition to the Board.

cided against the company by the Court of Appeals and, of course, merit no further review here. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498.

For these reasons and those stated in the brief in opposition of the National Labor Relations Board, the petition for certiorari should be denied.

Respectfully submitted,

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